

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

AMY ARMSTRONG,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of  
Social Security,

Defendant.

CASE NO. C05-5826FDB-KLS

REPORT AND  
RECOMMENDATION

Noted for July 28, 2006

Plaintiff, Amy Armstrong, has brought this matter for judicial review of the denial of her application for supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Honorable Franklin D. Burgess' review.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is twenty-four years old.<sup>1</sup> Tr. 23. She has a tenth grade education and past work experience as a fast food cashier, concession stand operator, certified nurse assistant, and sales

<sup>1</sup>Plaintiff's date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 representative. Tr. 20, 68, 75.

2 On December 31, 2002, plaintiff protectively filed an application for SSI benefits, alleging disability  
3 as of February 6, 2002, due to bipolar disorder. Tr. 16, 58, 67. Her application was denied initially and on  
4 reconsideration. Tr. 23-25, 31. A hearing was held before an administrative law judge (“ALJ”) on March  
5 11, 2005, at which plaintiff, represented by counsel, appeared and testified, as did a medical expert and a  
6 vocational expert. Tr. 284-322.

7 On May 23, 2005, the ALJ issued a decision, determining plaintiff to be not disabled, finding  
8 specifically in relevant part:

- 9 (1) at step one of the disability evaluation process, plaintiff had not engaged in  
10 substantial gainful activity since her alleged onset date of disability;
- 11 (2) at step two, plaintiff had “severe” impairments consisting of an affective disorder  
and an anxiety disorder;
- 12 (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any of  
13 those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 14 (4) at step four, plaintiff had the residual functional capacity to perform work  
without any physical restrictions, but with certain non-exertional limitations,  
15 which precluded her from performing her past relevant work; and
- 16 (5) at step five, plaintiff was capable of performing other jobs existing in significant  
numbers in the national economy.

17 Tr. 21-22. Plaintiff’s request for review was denied by the Appeals Council on November 10, 2005, making  
18 the ALJ’s decision the Commissioner’s final decision. Tr. 5; 20 C.F.R. § 416.1481.

19 On December 22, 2005, plaintiff filed a complaint in this Court seeking review of the ALJ’s  
20 decision. (Dkt. #1-#3). Specifically, plaintiff argues that decision should be reversed and remanded for an  
21 award of benefits, or, in the alternative, for further administrative proceedings, for the following reasons:

- 22 (a) the ALJ erred in giving controlling weight to the opinion of the medical expert;
- 23 (b) the ALJ erred in evaluating plaintiff’s mental functional capabilities;
- 24 (c) the ALJ erred in finding plaintiff was non-compliant with medical treatment; and
- 25 (d) the hypothetical question the ALJ posed to the vocational expert was defective.

26 The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reason set  
27 forth below, recommends that the ALJ’s decision be reversed, and that this matter be remanded to the  
28 Commissioner for further administrative proceedings. While plaintiff requests oral argument in this matter,

1 the undersigned finds such argument to be unnecessary here.

## 2 DISCUSSION

3 This Court must uphold the Commissioner's determination that plaintiff is not disabled if the  
 4 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole to  
 5 support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9<sup>th</sup> Cir. 1986). Substantial evidence is  
 6 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson  
 7 v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9<sup>th</sup> Cir. 1985). It is more than  
 8 a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup> Cir.  
 9 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than  
 10 one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749 F.2d  
 11 577, 579 (9<sup>th</sup> Cir. 1984).

### 12 I. The ALJ Erred in Evaluating the Opinion of the Medical Expert

13 The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the  
 14 medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Where the medical evidence in the  
 15 record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the  
 16 ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1982). In such cases, "the ALJ's conclusion must  
 17 be upheld." Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 601 (9<sup>th</sup> Cir.  
 18 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact  
 19 inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts  
 20 "falls within this responsibility." Id. at 603.

21 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings "must be  
 22 supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this "by setting out a  
 23 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation  
 24 thereof, and making findings." Id. The ALJ also may draw inferences "logically flowing from the evidence."  
 25 Sample, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences from the  
 26 ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755, (9<sup>th</sup> Cir. 1989).

27 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of  
 28 either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Even when a

1 treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and  
2 legitimate reasons that are supported by substantial evidence in the record." Id. at 830-31. However, the  
3 ALJ "need not discuss *all* evidence presented" to him or her. Vincent on Behalf of Vincent v. Heckler, 739  
4 F.3d 1393, 1394-95 (9<sup>th</sup> Cir. 1984) (citation omitted) (emphasis in the original). The ALJ must only explain  
5 why "significant probative evidence has been rejected." Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07  
6 (3d Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7<sup>th</sup> Cir. 1984).

7 In general, more weight is given to a treating physician's opinion than to the opinions of those who  
8 do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of  
9 a treating physician, "if that opinion is brief, conclusory, and inadequately supported by clinical findings" or  
10 "by the record as a whole." Batson v. Commissioner of Social Security Administration, 359 F.3d 1190,  
11 1195 (9<sup>th</sup> Cir., 2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002); Tonapetyan v. Halter, 242  
12 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001). An examining physician's opinion is "entitled to greater weight than the  
13 opinion of a nonexamining physician." Lester, 81 F.3d at 830-31. A nonexamining physician's opinion may  
14 constitute substantial evidence if "it is consistent with other independent evidence in the record." Id. at 830-  
15 31; Tonapetyan, 242 F.3d at 1149.

16 At the hearing, the medical expert, Dr. Norman Gustavson, testified that the restrictions in plaintiff's  
17 activities of daily living were "between mild and moderate," and that while her anxiety was a "barrier" for  
18 her, she was able to "kind of" work around it. Tr. 315. He further testified that she had "marked"  
19 difficulties in maintaining social functioning, due to "her history of problems" with her bosses, neighbors,  
20 and teachers. Id. In addition, Dr. Gustavson testified that while there was "nothing in the record" regarding  
21 difficulties with concentration, persistence or pace, her limitations in that area were "[m]ild to moderate."  
22 Id. He also found no episodes of decompensation of extended duration, although he did note "many, many  
23 decompensations of a short period." Tr. 315-16.

24 Finally, Dr. Gustavson testified that he saw no reason why plaintiff's condition would prevent her  
25 from taking her medications or getting to her mental health treatment appointments on time, though he did  
26 admit that attendance issues she mentioned with respect to one of her jobs did correlate with her problems  
27 maintaining good attendance with her treatment providers. Tr. 316. More specifically regarding the missed  
28 appointments, Dr. Gustavson concluded in relevant part as follows:

1 [W]hat seems to come up most in the . . . records about the missed appointments is  
2 double-booking herself, or [at] least that's what sort of, they talk about. It's a little  
3 different issue than not showing up just because you found something else better to do  
4 or didn't feel like going that day or -- so, but I think they probably are related. They  
5 probably -- I mean I don't know why she had so much absenteeism at these other things.  
6 We didn't get into talking about.

7 Tr. 317.

8 With respect to Dr. Gustavson's testimony, the ALJ made the following findings:

9 Dr. Gustavson's testimony is considered, but it is not adopted. The claimant in fact has  
10 relationships with family, she has a boyfriend, and she goes to appointments when she  
11 chooses to do so. She apparently has some social limitations based on her frequent  
12 conflicts with neighbors.

13 Tr. 19. Plaintiff argues the ALJ erred by failing to adopt Dr. Gustavson's testimony. First, plaintiff asserts  
14 the ALJ should have given Dr. Gustavson's testimony controlling weight, because Dr. Gustavson was the  
15 only medical source to have reviewed the entire record. While this certainly is a factor the ALJ should take  
16 into account in evaluating a medical source opinion, it alone does not necessarily mean the ALJ is required  
17 to adopt that opinion or give it controlling weight. See 20 C.F.R. § 416.927(d)(6); Social Security Ruling  
18 96-6p, 1996 WL 374185 \*2.

19 Second, plaintiff asserts the ALJ erred by stating that she goes to her appointments only when she  
20 chooses to do so. To support this assertion, plaintiff points to that portion of Dr. Gustavson's testimony  
21 where he stated she was "not showing up just because" she "found something else better to do or didn't feel  
22 like going that day." Tr. 317. She also claims Dr. Gustavson testified that it was her personality disorder  
23 that caused her to miss her appointments. While it does appear Dr. Gustavson gave some indication that  
24 plaintiff's attendance issues may have been due in part to her personality disorder, he clearly concluded that  
25 ultimately he did not know why "she had so much absenteeism." Id. As such, it is not at all clear that Dr.  
26 Gustavson felt her absenteeism was due to factors other than her own choosing.

27 Plaintiff's mental health treatment progress notes, furthermore, fail to show that her absenteeism is  
28 necessarily the result of her personality disorder. See Tr. 132, 185, 205, 207, 210, 213, 243, 247. For  
example, it was noted in late May 2003, that she had "missed several prior appointments," and it was  
"[s]tressed" to her "the importance of attending her appointments." Tr. 132. In mid-June 2003, plaintiff's  
mental health treatment provider stated that a letter should be sent to her informing her that she needed to  
attend on a "monthly basis." Tr. 247. Again, it was explained to her later that month that she needed "to

1 keep appointments.” Tr. 243. In late April 2004, plaintiff was reported to have called to cancel her  
2 appointment only after that appointment was over because she was out of the area, and the mental health  
3 treatment provider commented that a continuing attempt to “reach” her “from time to time” would be made  
4 to see if she was “willing to make therapy appointments and keep them.” Tr. 213.

5 In early May 2004, plaintiff “did not appear” for her scheduled appointment, nor did she call ahead  
6 of time to cancel. Tr. 210. The mental health treatment provider again commented that “[i]t is challenging  
7 for the client to have [sic] an idea [l] therapy experience when attendance is sporadic.” Id. The same thing  
8 occurred later that month, and it was noted that “[a]t some point we will need to determine whether or not  
9 Amy’s life is such that she is truly able to come regularly to appointments.” Tr. 207. It is true that one  
10 mental health treatment provider opined in early March 2005, that because of plaintiff’s “extreme anxiety  
11 around others,” she had “not been able to participate” in her self-help classes. Tr. 270. However, none of  
12 the prior progress notes mentioned or indicated this as a reason for her multiple absences.

13 Nevertheless, the undersigned finds the ALJ erred in evaluating Dr. Gustavson’s testimony. The  
14 fact that plaintiff has a family and a boyfriend alone is an insufficient reason to discount Dr. Gustavson’s  
15 opinion regarding her social functioning. That is, the mere fact that a claimant can relate to his or her family  
16 or significant other, does not necessarily mean that claimant is able to function effectively around others. In  
17 addition, while, as discussed above, the record fails to establish that plaintiff’s absenteeism is necessarily due  
18 to her personality disorder, it also fails to show definitively that her absences are due solely to the fact that  
19 she goes to appointments only when she chooses to do so. Tr. 19.

20 On the other hand, Dr. Gustavson is the only “acceptable medical source” in the record to find she  
21 has marked restrictions in her activities of daily living. Tr. 125-28, 162-72, 277-80; See Gomez v. Chater,  
22 74 F.3d 967, 970-71 (9<sup>th</sup> Cir. 1996) (licensed physicians and licensed or certified psychologists are  
23 “acceptable medical sources”); 20 C.F.R. § 416.913(a), (d). As discussed above, the mere fact that Dr.  
24 Gustavson’s testimony post-dates the other medical source opinion evidence in the record, does not alone  
25 mean that testimony should be given the most or controlling weight. The ALJ’s decision, however, fails to  
26 indicate how the ALJ evaluated Dr. Gustavson’s testimony in light of this other evidence. Accordingly, on  
27 remand, the Commissioner shall re-consider that testimony and evidence, and re-determine what weight, if  
28 any, to give Dr. Gustavson’s opinion regarding plaintiff’s social functioning.

1 II. The ALJ Erred in Evaluating Plaintiff's Mental Functional Limitations

2 To evaluate the severity of a claimant's mental impairments, the Commissioner must "follow a  
3 special technique at each level in the administrative review process." 20 C.F.R. § 416.920a(a). Under this  
4 technique, the Commissioner first determines whether the claimant has a medically determinable  
5 impairment. 20 C.F.R. § 416.920a(b)(1). If the claimant does have such an impairment, then the  
6 Commissioner rates the "degree of functional limitation" resulting from that impairment. 20 C.F.R. [§  
7 416.920a(b)(2).

8 Rating the degree of functional limitation involves consideration of four functional areas: activities  
9 of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. 20  
10 C.F.R. § 416.920a(c). If a claimant's degree of limitation in the first three areas is rated "none" or "mild"  
11 and "none" in the fourth area, then the claimant's mental impairment generally is considered not severe,  
12 unless evidence in the record otherwise indicates there is more than a minimal limitation in the claimant's  
13 ability to do basic work activities. 20 C.F.R. § 404.920a(d)(1). At the initial and reconsideration levels of  
14 the administrative review process, "a standard document" is completed to record how the above technique  
15 was applied. 20 C.F.R. § 416.920a(e). At the ALJ hearing level, documentation of the technique is done in  
16 the decision itself. Id.

17 Here, plaintiff argues the ALJ erred in failing to rate the degree of limitation caused by her mental  
18 impairments. Defendant counters that the ALJ did properly document his rating of plaintiff's degree of  
19 limitation by making the following findings:

20 The claimant's file was reviewed by a consulting psychologist for the State Disability  
21 Determination Service (DDS) in April 2003 [James L. Lewis, Ph.D., Tr. 162-72]. He  
22 determined that the claimant had a bipolar disorder, an anxiety disorder NOS, and a  
23 history of substance abuse in remission. These impairments caused mild difficulty with  
24 daily living activities, moderate difficulty with social functioning, and mild difficulty with  
25 concentration, persistence, and pace. There were one or two extended episodes of  
decompensation. The claimant's condition did not meet the "B" or "C" criteria of a  
listing . . . More specifically, the claimant could manage simple and complex instructions  
and simple work-related decisions. She might have some difficulty responding to others  
and would work best away from frequent public contact . . . This assessment has a fair  
degree of support in the record.

26 Tr. 20. The undersigned agrees with plaintiff that the ALJ failed to adequately set forth in his decision the  
27 degree of limitation caused by his mental impairments. While the ALJ found Dr. Lewis' findings to have "a  
28 fair degree of support in the record," it is far from clear that the ALJ intended such reference to those  
findings to constitute the rating required by 20 C.F.R. § 416.920.

Nevertheless, the undersigned finds such error to be harmless. See Batson v. Commissioner of the Social Security Administration, 359 F.3d 1190, 1197 (9<sup>th</sup> Cir. 2004) (applying harmless error standard); Curry v. Sullivan, 925 F.2d 1127, 1131 (9<sup>th</sup> Cir. 1990) (holding ALJ committed harmless error). Rating the degree of limitation is used to determine whether or not a claimant's mental impairments are severe. Here, the ALJ found plaintiff's affective disorder and anxiety disorder to be severe. Plaintiff has not alleged that the ALJ should have found any other of her mental impairments to be severe. Thus, while the ALJ did err here, that error had no effect on the ALJ's ultimate decision regarding plaintiff's disability.

### III. The ALJ Did Not Err in Finding Plaintiff to Have Been Non-Compliant with Medical Treatment

Failure to assert a good reason for not seeking, or following a prescribed course of, treatment, or a finding that a proffered reason is not believable, "can cast doubt on the sincerity of the claimant's pain testimony." Fair v. Bowen, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). see also Meanal v. Apfel, 172 F.3d 1111, 1114 (9<sup>th</sup> Cir. 1999) (ALJ properly considered physician's failure to prescribe, and claimant's failure to request serious medical treatment for supposedly excruciating pain); Johnson v. Shalala, 60 F.3d 1428, 1434 (9<sup>th</sup> Cir. 1995) (ALJ properly found prescription of physician for conservative treatment only to be suggestive of lower level of pain and functional limitation).

The ALJ found a "lack of cooperation with treatment" on the part of plaintiff. Tr. 19. Specifically, with respect to this issue, the ALJ found in relevant part as follows:

She has a history of refusing to comply with recommended treatment; she said that she will not take medication . . . and she has frequent no-shows at appointments . . . When asked why, she said that she does not like pills and she has other errands to do. These comments suggest that the claimant is not as limited as she has reported.

Id. Plaintiff argues the ALJ erred in so finding, citing to Byrnes v. Shalala, 60 F.3d 639, 641 (9<sup>th</sup> Cir. 1995) for the proposition that the ALJ "must 'examine the medical conditions and personal factors that bear on whether [a claimant] can reasonably remedy' his impairment." (citations omitted). What the Ninth Circuit actually stated in that decision, however, was that the ALJ must do so "before basing a denial of benefits on noncompliance."<sup>2</sup> Id. (emphasis added).

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<sup>2</sup>The ALJ did state that he found plaintiff's "lack of compliance with treatment" to constitute "substantial grounds to deny disability benefits" as well. Tr. 19. If the ALJ actually had based the denial of benefits on plaintiff's non-compliance, this would indeed have been improper as the ALJ made no specific examination of plaintiff's medical conditions and personal factors that bore on whether she could reasonably remedy her impairments. It appears, however, that the ALJ did not deny plaintiff benefits for this reason, as it was not contained in the ALJ's formal findings section. See Tr. 21.

1 Plaintiff further argues though, that the ALJ also erred in finding that she actually had been non-  
2 compliant with her recommended treatment. The undersigned disagrees. While, as discussed above, the  
3 record does not definitely support the ALJ's finding that plaintiff goes to appointments only when she  
4 chooses to do so, it clearly indicates there has been at least some level of non-compliance in that regard.  
5 Other evidence in the record, furthermore, shows plaintiff to have been non-compliant with respect to  
6 taking recommended medication as well. As such, the ALJ did not err in relying on this factor in part to  
7 discount plaintiff's credibility.

8 As noted above, the record documents a number of instances when plaintiff missed her mental health  
9 treatment appointments without providing timely or adequate explanations for those absences. See Tr. 132,  
10 185, 205, 207, 210, 213, 243, 247. Her mental health treatment providers at the time also noted that her  
11 treatment was being rendered much less effective because of her absenteeism, despite it being explained to  
12 her the need for consistent attendance. See id. In addition, while there is some indication in the record that  
13 plaintiff had refused to take her medication out of fear of potential side effects (see Tr. 177, 232, 251, 262,  
14 265, 268), other evidence indicates otherwise (Tr. 125, 128, 185, 190, 212, 220, 226, 229-30, 249-52, 256,  
15 258-61, 266, 269, 316).

16 For example, plaintiff reported in early April 2003, that it was "difficult for her [to] comply with a  
17 medication that is not on a simple, twice a day schedule," rather than due to anxiety over perceived side  
18 effects. Tr. 125. Indeed, it was noted expressly at that time that her treatment had been "spotty with many  
19 medication trials and poor compliance." Tr. 128. Dr. Gustavson testified that there was no reason why her  
20 condition would prevent her from taking her medication or, indeed, getting to her appointments on time. Tr.  
21 316. In early July, 2003, plaintiff reported that she had "tried medication several years ago, but then she got  
22 pregnant with her first son and could not take many of the medications," again, rather than because of any  
23 fears she had regarding side effects. Tr. 185.

24 While she expressed a willingness to take medications at that time, later she still had not done so. Tr.  
25 190, 265-66, 269. In addition, she reported that "she threw out her old medication when she was angry  
26 once about not taking them." Tr. 266. In late September 2003, plaintiff reported that despite being afraid of  
27 taking her medications, she knew she needed to "in order to help her manage her moods and anger  
28 outbursts," and stated that she was going to try to do so. Tr. 230. Although plaintiff reported that she was

1 “finally starting to take them” in late October 2003, by late January 2004, she apparently still had not started  
2 to do so. Tr. 229, 261-62.

3 When she did start taking her medications, plaintiff reported “a big change in her anxiety attacks,”  
4 that she no longer was having any, and that she felt “more ‘mellow.’” Tr. 259. She also told one of her  
5 mental health treatment providers that she would take her medication if she had to, because she knew that  
6 she needed “to be on something.” Tr. 226. She continued to have “[n]o side effects” from her medication  
7 for the most part, and her temper remained “under control.” Tr. 256, 258-60. In mid-March 2004, it was  
8 noted that plaintiff’s medications appeared “to be helping her mood swings and anxiety.” Tr. 220.

9 In late April 2004, plaintiff stated that she hated “taking pills,” because she kept “forgetting to take  
10 them.” Tr. 212. She further reported at the time that she was “freaking out even more” than she used to,  
11 and was told that she was “not experiencing the beneficial affects [sic] that she would if she were totally  
12 med-compliant.” Id. In late May 2004, plaintiff stated that she was “trying real hard to be med-compliant.”  
13 Tr. 208. Yet, despite her prior improvement on medication and expressed willingness to take them, she  
14 reported again going off her medications for a month in late July 2004, and “noticed a big increase in  
15 anxiety and depression” as a result thereof. Tr. 251-52.

16 Plaintiff reported having “been off her medication for many months” in late December 2004, as well,  
17 despite acknowledging once more that she had tolerated it “well” when she was on it. Tr. 249-50. Indeed,  
18 she was “anxious” to go back on the medication at that time. Tr. 250. The ALJ, therefore, had plenty of  
19 evidence on which to base his determination that plaintiff had been non-compliant with her recommended  
20 treatment. To the extent that such evidence could be seen as contradictory or ambiguous, furthermore, this  
21 is not a legitimate basis for challenging that determination. See Allen, 749 F.2d at 579 (court may not  
22 reverse credibility determination where that determination is based on contradictory or ambiguous  
23 evidence). Accordingly, the undersigned finds no error here.

#### 24 IV. The ALJ’s Step Five Analysis

25 If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation  
26 process the ALJ must show there are a significant number of jobs in the national economy the claimant is  
27 able to do. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9<sup>th</sup> Cir. 1999); 20 C.F.R. § 416.920(d), (e). The ALJ  
28 can do this through the testimony of a vocational expert or by reference to the Commissioner’s Medical-

1 Vocational Guidelines (the “Grids”). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157,  
2 1162 (9<sup>th</sup> Cir. 2000).

3 An ALJ’s findings will be upheld if the weight of the medical evidence supports the hypothetical  
4 posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9<sup>th</sup> Cir. 1987); Gallant v. Heckler, 753 F.2d  
5 1450, 1456 (9<sup>th</sup> Cir. 1984). The vocational expert’s testimony therefore must be reliable in light of the  
6 medical evidence to qualify as substantial evidence. Embrey v. Bowen, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988).  
7 Accordingly, the ALJ’s description of the claimant’s disability “must be accurate, detailed, and supported by  
8 the medical record.” Embrey, 849 F.2d at 422 (citations omitted). The ALJ, however, may omit from that  
9 description those limitations he or she finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9<sup>th</sup> Cir.  
10 2001).

11 Here, the ALJ posed the following hypothetical question to the vocational expert:

12 Considering someone of the Claimant’s age, education, and work experience, has a  
13 tenth-grade education. She is 23 years old with non-public, limited contact with  
coworkers, limited contact with supervision. Let’s make it detailed but not complex.

14 Tr. 319. In response, the vocational expert testified that there were other jobs that plaintiff could do. Id.  
15 Based on the vocational expert’s testimony, the ALJ found plaintiff capable of performing other jobs  
16 existing in significant numbers in the national economy. Tr. 20-21.

17 Plaintiff argues the above hypothetical question was defective, because the ALJ improperly rejected  
18 the testimony of Dr. Gustavson, and because he mis-characterized the evidence in the record with respect to  
19 her medication compliance and appointment attendance. As discussed above, while the evidence in the  
20 record does not necessarily support the ALJ’s statement that plaintiff goes to appointments only when she  
21 chooses to do so, the ALJ nevertheless did not err in finding her to be non-compliant with recommended  
22 treatment and thus properly discounted her credibility in part for that reason. On the other hand, also as  
23 discussed above, the ALJ provided insufficient reasons for rejecting the testimony of Dr. Gustavson. For  
24 that reason alone, it is not clear the hypothetical question the ALJ posed to the vocational expert included  
25 all of plaintiff’s limitations.

26 V. This Matter Should Be Remanded for Further Administrative Proceedings

27 The Court may remand this case “either for additional evidence and findings or to award benefits.”  
28 Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course,

except in rare circumstances, is to remand to the agency for additional investigation or explanation.”  
Benecke v. Barnhart, 379 F.3d 587, 595 (9<sup>th</sup> Cir. 2004) (citations omitted). Thus, it is “the unusual case in  
 which it is clear from the record that the claimant is unable to perform gainful employment in the national  
 economy,” that “remand for an immediate award of benefits is appropriate.” Id.

Benefits may be awarded where “the record has been fully developed” and “further administrative  
 proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d  
 1195, 1210 (9<sup>th</sup> Cir. 2001). Specifically, benefits should be awarded where:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant’s]  
 evidence, (2) there are no outstanding issues that must be resolved before a  
 determination of disability can be made, and (3) it is clear from the record that the ALJ  
 would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9<sup>th</sup> Cir. 2002). Here, as  
 discussed above, issues remain as to the nature and extent of plaintiff’s difficulties in maintaining social  
 functioning and as to whether she is capable of performing other work existing in significant numbers in the  
 national economy. For these reasons, this matter should be remanded to the Commissioner for further  
 administrative proceedings.

### CONCLUSION

Based on the foregoing discussion, the Court should find the ALJ improperly concluded plaintiff  
 was not disabled, and should reverse the ALJ’s decision and remand this matter to the Commissioner for  
 further administrative proceedings in accordance with the findings contained herein.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 72(b),  
 the parties shall have ten (10) days from service of this Report and Recommendation to file written  
 objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit  
 imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **July 28, 2006**, as  
 noted in the caption.

DATED this 6th day of July, 2006.



Karen L. Strombom  
 United States Magistrate Judge